No. 1.

IN THE

Supreme Court of the United States

October Term—1943

R. SIMPSON & CO. INC., *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER

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CORRECTION OF RESPONDENT'S STATEMENTS OF FACT

The respondent, in his brief herein has, inadvertently, no doubt, made certain misstatements of the facts herein. In order that this Honorable Court may completely understand the circumstances at bar, we believe we should here point out these errors:

Page 4, Par. 1—"The *treasurer* of the company who executed its income tax returns"—should read "The *president* of the company who executed its income tax returns" (R. 28).

Page 4, Pars. 2 and 3—"The Commissioner *assessed* personal holding surtaxes for the years in question under Section 351 of the Revenue Acts of 1934 and 1936, and a 25% penalty for failure to file the personal holding company returns under Section 291 of the Revenue Acts of 1934 and 1936 and under Section 406 of the Revenue Act of 1935 (R. 8-16). The Board of Tax Appeals affirmed the deficiencies and penalties so *assessed* (R. 28-30, 31)".—Because of the vital importance of the fact of the petitioner's

good faith and financial responsibility herein, we believe that this Court should have no doubt that the situation at bar was *not* of the type where the Commissioner made or attempted to make a jeopardy or other assessment prior to judicial hearing of the controversy (R. 8-16, 28-30, 31).

BOTH SIDES MAINTAIN THAT THIS COURT HAS JURISDICTION HEREIN.

Both sides maintain that there is no impediment produced by Internal Revenue Code Section 1140 or other statute or by the decision in the case of *Helvering* v. *Northern Coal Co.*, 293 U. S. 191 (based on an authoritative and explicit limitation in another subsection (b(3)) of I. R. C. Sec. 1140, not present in the subsection (b(2)) applicable to the situation at bar) to the assumption by this Honorable Court of jurisdiction herein. The Commissioner agrees that this interpretation of the jurisdiction of this Court presents no hazard to the revenues.

Bearing in mind the rule which requires strict construction of statutes which impose penalties, the undisputed good faith of the petitioner herein, and the full revelation by it to the respondent of its gross income, in the Form 1120 returns which it filed, no penalty should have been imposed on the petitioner herein. The respondent has cited no decision of this Honorable Court enunciating a different governing principle and most of the board and lower Court cases which he cites are clearly inapplicable to the situation at bar.

It is, of course, hornbook law that statutes (including tax legislation) which impose penalties are to be strictly construed.

See *United States* v. *Yuginovich*, 256 U. S. 450.
Augusta Com. Bank v. *Sandford*, 103 Fed. 98.

This rule would seem to have particular application in a situation where, as in the case at bar, a drastic penalty is sought to be imposed on top of what is in intent and actuality a most severe penalty in itself—a personal holding company surtax.

The Board of Tax Appeals found (R. 28) and the Commissioner does not attempt to deny, that the petitioner honestly believed that it was not a personal holding company and so stated in its timely and proper regular corporation returns (Form 1120) for the taxable years in question.

The Board further found that the returns filed by the petitioner showed all the gross income necessary for the Commissioner to compute to the fullest extent any personal holding company taxes which he might feel were due from the petitioner. The Commissioner asserts at page 37 of his brief herein that "the returns actually filed would not enable him to compute the personal holding company surtax". But the only facts he is able to cite (see Respondent's brief, p. 37) in support of this claim do not show that the entire gross income, necessary for the calculation of the fullest amount of tax were not thus revealed to him, but that certain possible *deductions*, which would reduce the tax, might have existed! Even as to these he admits (p. 37 of his brief) that some of this information might be obtained from the balance sheets and reconciliation statements attached to the Forms 1120 filed by the petitioner. Surely the Commissioner cannot be heard to assert that drastic penalties should be imposed on a taxpayer because he may not have furnished facts which would *reduce* his tax.

We submit that, as held by the unanimous Ninth Circuit in *Lane-Wells Co.* v. *Commissioner* (1943) 134 F. (2d) 977, and as Judge Learned Hand of the Second Circuit, said, in his dissenting opinion, in the case of *O'Sullivan Rubber Co.* v. *Commissioner* (1941) 120 F. (2d) 845, 849, "the penalty was

not meant for that" (honest failure as in the case at bar to file a Form 1120H return in addition to a Form 1120) "it was imposed to punish delinquents; those who either deliberately, or from indifference, made no effort at all to pay their taxes, not those who merely misunderstood duties which they tried to discharge".

Respondent's Cases.

The respondent has cited no decision of this Honorable Court which lays down a different rule of law than the one contended for by the petitioner herein. Most of the Board and lower Court cases cited by the respondent are clearly inapplicable here. Some involve the element of bad faith (not found by the Board or even asserted by the Commissioner to be present in the case at bar);

Bienheim v. Commissioner, 125 F. (2d) 906

("the Commissioner sent numerous letters to the petitioner and to its representatives both in the United States and in Canada requesting that a normal tax return (Form 1120) be prepared and filed" and "received no response whatever to his numerous letters").

Beam v. Hamilton, 289 Fed. 9 (C. C. A. 6th).

("Two witnesses testified without dispute that plaintiff refused, under advice of his accountant, to sign the excess profits return prepared by the revenue officers.")

Updike v. United States, 8 F. (2d) 1913 (C. C. A. 8th).

("We cannot shut our eyes to the obvious fact that the Missouri Valley Elevator Company was dissolved with full knowledge on the part of its stock-

holders of this impending legislation and for the primary purpose of avoiding taxation thereunder.")

Others involved situations (unlike the one at bar) where no return of any sort were filed:

Scranton-Lackawanna T. Co. v. *Commissioner*, 80 F. (2d) 519 (C. C. A. 3d);

Edmonds v. *Commissioner*, 90 F. (2d) 14 (C. C. A. 9th);

Fidelity & Columbia T. Co. v. *Commissioner*, 90 F. (2d) 219 (C. C. A. 6th).

Still others involved cases where the return filed was not signed or verified:

Plunkett v. *Commissioner*, 118 F. (2d) 644 (C. C. A. 1st).

(This case, cited by the Commissioner, clearly recognizes that the penalty under Revenue Act 1934, Section 291 is not mandatory for the Court said "In order to escape the penalty petitioner must show reasonable cause for his failure to file a proper return.")

Uhl Estate Co. v. *Commissioner*, 116 F. (2d) 403.

(Even in this case of failure to file any sort of a *verified* return there was a dissent to imposition of the penalty, to judge saying, "Section 291 is a penal statute and should be strictly construed against the Government.")

Commissioner's cited case of *Girard Investment Co.* v. *Commissioner*, 122 F. (2d) 843 (C. C. A. 3d), is merely a dictum on the penalty point as a return was eventually filed and his case of *National Contracting Co.* v. *Commissioner*, 105 F. (2d) 488 (C. C. A. 8th) involved, unlike the case at bar, a failure to fully state gross income.

The 1936 Penalties.

Commissioner admits at page 45 of his brief herein that "Section 291 of the 1936 Act apparently permits relief from the penalty provisions for failure to file, as well as for tardy filing of returns if the same is 'due to reasonable cause and not due to willful neglect' " but states, at page 46 of his brief that the Board had determined that there was not reasonable cause. An examination of the finding of facts of the Board (R. 26-28) reveals no such finding and it is plain from its opinion that it felt it was bound to adhere to its view as expressed in the prior case of *Lane-Wells Co.*, 43 B. T. A. 463 (later unanimously overruled in *Lane-Wells Co. v. Commissioner*, 134 F. (2d) 977) that the penalty was mandatory. There is thus here no determination of fact by the Board that must be respected by this Honorable Court, but merely a conclusion of law which we respectfully submit is clearly erroneous.

Conclusion.

Wherefore it is respectfully submitted that that portion of the judgment, herein, of the United States Circuit Court of Appeals for the Second Circuit, which imposes a tax penalty, should be reversed, and that this petitioner should have such other and further relief in the premises as to this Honorable Court seems meet and just.

Respectfully submitted,

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